TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 192

HERBERT LESTER TYSON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 29, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NORTH CAROLINA, DISTRICT COURT AT RALEIGH

HERBERT LESTER TYSON, Plaintiff (Pauper Plaintiff),

against

UNITED STATES OF AMERICA, Defendant

SUMMONS AND RETURN—Filed Nov. 23, 1932

The President of the United States of America, to the Marshal of the Eastern District of North Carolina, Greeting:

You are hereby commanded to summon W. H. Fisher, U. S. District Attorney, Wilmington, N. C., a citizen and resident of the Eastern District of North Carolina, to appear at Raleigh, N. C., then and there to answer the complaint of Herbert Lester Tyson, Cumberland County, the plaintiff herein, a citizen and resident of the State of North Carolina, which complaint has been filed in said court and served together with this Summons. And let the said defendant take notice, that if he fail to answer the said complaint within the time allowed by law, to wit: Within 60 days after the service of complaint, the plaintiff will take judgment against him for the relief demanded in the complaint according to the regular course of the Court.

Herein fail not, and have you then and there this Summons.

Witness, The Hon. Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, in said District, the 17 day of Nov., 1932, and in the 157 year of the Independence of the United States. (Seal.)

S. A. Ashe, Clerk; by W. M. Bateman, Deputy Clerk.

A True Copy:
Test: ——, Clerk.

Marshal's Return

Received at Wilmington, N. C., Nov. 19th, 1932. Executed same day and place by personal service and copy to W. H. Fisher, U. S. Attorney,

E. C. Geddie, U. S. Marshal; by I. D. Harrelson, Deputy.

$2.00.

Received at Wilmington, N. C., Nov. 19th, 1932. Executed same day and place by personal service and copy to W. H. Fisher, U. S. Attorney.

(S.) E. C. Geddie, U. S. Marshal, by I. D. Harrelson, Deputy.

$2.00.

I certify that the within is entered and filed this day Nov. 23, 1932. S. A. Ashe, Clerk.

[fol. 3] In United States District Court for the Eastern District of North Carolina

[Title omitted]

Petition—Filed November 17, 1932

Plaintiff above named, respectfully shows the Court and alleges as follows:

I

That the plaintiff is a citizen and resident of the County of Cumberland, State of North Carolina, and of the Eastern District thereof.

II

That the plaintiff enlisted in the United States Army for military service in the World War on the 2nd day of August, 1918, at Elizabethtown, North Carolina, and remained in said service until the 18th day of December, 1918, when he was given an honorable discharge therefrom under disability at Camp Stewart, Virginia; that during the period of his said service the plaintiff served as Private of 313th Fire and Guard Company, Quartermaster Corps, United States Army.

III

That during said period of military service, desiring to be insured against the hazard of risk of death or total and permanent disability this plaintiff applied for a policy of War Risk Insurance in the sum of $10,000 and said application was accepted, and thereafter there was deducted monthly by the defendant from the plaintiff's monthly pay premium for said insurance and said insurance was granted and the certificate or policy of War Risk Insurance was duly issued to him by the terms whereof the defendant agreed to pay to the plaintiff the sum of $57.50 per month in the event of death or total and permanent disability in- [fol. 4] curred during the life of said insurance contract; that the monthly payments of premium were duly made on the same until the happening of the event against which the said insurance was granted; that the said certificate of insurance issued to the plaintiff was continuously from the time of issuance thereof until the date of the bringing of this action and still is in full force and effect.

IV.

That during the life of said insurance policy contract and while the plaintiff was in active military service of the United States Army, plaintiff as a result of and in connection with the performance of his duties in said Army while in camp at Lambert's Point, Virginia, was stricken with arthritis to such an extent that the plaintiff was required to spend ninety-eight days in an embarkation hospital at Camp Stewart, Newport News, Virginia; that on account of such di-ability resulting from said service, plaintiff was discharged from service under disability at Camp Stewart on December 18th, 1918; that since the date of his said discharge, the plaintiff has been continuously under the necessity of having medical treatment; that the plaintiff's injuries and disabilities resulting from such causes have continued unabated and in an increasingly aggravated form in that the plaintiff on account of the injuries and disease resulting from his said service, has been disabled and handicapped in the use of his arms and legs, and that nearly all the muscles of his body have been violently and painfully affected, and his heart has likewise been seriously affected by the said disease of arthritis and its consequent results; that the plaintiff on account thereof has been from the

date of his discharge until the time of bringing this action, and still is totally and permanently disabled and thereby rendered unable to follow continuously any substantially gainful occupation.

V.

That by reason of the aforesaid injuries sustained by the plaintiff during the period of his service in the United States Army, rendering the plaintiff as aforesaid, unable to follow continuously any substantially gainful occupa-
[fol. 5] tion, and totally and permanently disabling the plaintiff from the time of his said discharge until now, the plaintiff is entitled to receive from the defendant under the terms of the said policy contract the sum of $57.50 per month, for each and every month from the date of his said discharge, to-wit, the 18th day of December, 1918, until the date of bringing this action, and thereafter until the full amount of said policy shall have been paid.

VI.

That the plaintiff has made due proof of his said disability to the said defendant and to the United States Veterans Bureau and the Bureau of War Risk Insurance and the Director thereof, and demanded payment of the aforesaid amounts, but defendant and said Bureau and its Director disagreed with the plaintiff as to his disability and has totally failed and refused to pay the said sum.

Wherefore, plaintiff prays that judgment be rendered in favor of the plaintiff in the sum of Nine Thousand Five Hundred Forty Five ($8,545.00) Dollars, being the amount due under said policy at the rate of $57.50 per month, from the date of his discharge, to-wit, December 18, 1918, until the filing of this action.

And the plaintiff further prays judgment against this defendant in the sum of $57.50 for each and every month after the 19th day of October, 1932, until the full amount due under said policy shall have been paid, and for costs herein incurred, and for reasonable attorneys' fees. And plaintiff requests that a jury try this cause.

(S.) Herbert Lester Tyson. (S.) O. F. Johnson,
(S.) Biggs & Broughton, Attorneys for Plaintiff.

[fol. 6] *Duly sworn to by Herbert L. Tyson. Jurat omitted in printing.*

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed May 10, 1933

The defendant, for answer to the petition herein, alleges:

1. That the allegations of paragraph one of the petition are denied for the want of information and belief.

2. Answering the allegations of paragraph two, it is admitted that the above named plaintiff entered the military service of the United States on August 4, 1918, instead of August 2, 1918, and that he was discharged from the military service of the United States on December 18, 1918. The remaining allegations of paragraph two are denied for the want of information and belief.

3. Answering the allegations of paragraph three, it is admitted that while in the military service of the United States the plaintiff applied for and was granted a contract of War Risk Term Insurance in the sum of Ten Thousand Dollars ($10,000.00) by the terms of which it became payable in the event of total and permanent disability or death while said insurance was in force and effect of monthly installments of Fifty-seven and 50/100 Dollars ($57.50) each; that the plaintiff paid the premiums on said contract of War Risk Insurance up to and including the month of December 1918. The remaining allegations of paragraph three are denied.

4. Answering the allegations of paragraph four, it is admitted that plaintiff was discharged from the military service of the United States on December 18, 1918. The remaining allegations of paragraph four are denied.

[fol. 8] 5. The allegations of paragraph five are denied.

6. Answering the allegations of paragraph six, it is admitted that plaintiff has made demand upon the defendant for the payment of benefits upon the aforesaid contract of War Risk Term Insurance, that said demand has been denied and that there now exists a disagreement with respect thereto.

Wherefore, defendant prays that this action be dismissed and that it recover its costs.

(S.) W. H. Fisher, United States Attorney.

Duly sworn to by W. H. Fisher. Jurat omitted in printing.

[fol. 9] In United States District Court for the Eastern District of North Carolina, Raleigh Division, September Term, 1934

No. 1799—Law

Herbert Lester Tyson, Plaintiff

vs.

United States of America, Defendant

Judgment—Filed Sept. 11, 1934

This cause having come on to be heard at this September Term, 1934, of the United States District Court, at Raleigh, before His Honor, I. M. Meekins, Judge; and a Jury having been empaneled to try the cause, and the defendant having moved to dismiss the action for want of jurisdiction, in that the suit was not instituted within the time in which the United States has consented to be sued, as prescribed by statute; and certain records having been offered in evidence, and certain admissions having been made in open Court, the Court finds there from the following facts:

On December 2, 1930, Veterans Administration, through its proper officer, addressed a letter to Herbert Lester Tyson, enclosing Forms 526-F and 526-C.

On December 10, 1930, plaintiff signed and executed Form 526-F of the Veterans Administration, adjudication service, which was received by the Veterans Administration, December 12, 1930, and on December 11, 1930, plaintiff signed and executed, before a Notary Public, Form 526-C of the Veterans Administration, which forms were received by the Veterans Administration at Washington on the 12th day of December, 1930.

On July 2, 1931, plaintiff signed and executed Form 579 of the Veterans Administration, same being claim for In-

surance—Total and Permanent Disability, and which said claim was received by the Veterans Administration at Washington, on July 3, 1931.

Letter of Denial was issued by the proper officer of the Veterans Administration, dated November 12, 1932, the same being addressed to Herbert Lester Tyson. The envelope containing said letter being postmarked at Washington, November 14, 1932, and was received by the said Herbert Lester Tyson at his R. F. D. address in Bladen County, North Carolina, on November 16, 1[illegible].

[fol. 10] Summons was issued and petition filed on November 17, 1932, and copy of petition was served upon the United States Attorney on November 19, 1932.

The foregoing papers constitute the evidence offered in this case.

Whereupon, upon motion of J. O. Carr, United States Attorney for the Eastern District of North Carolina, it is ordered, adjudged and decreed that the Court has not acquired jurisdiction of this cause, and that the same be dismissed. The plaintiff having sued in forma pauperis no costs are taxed against him.

Done at Raleigh, North Carolina, this 11th day of September, 1934.

(S.) I. M. Meekins, United States District Judge.

[fol. 11] In United States District Court

[Title omitted]

Bill of Exceptions—Filed Nov. 28, 1934

Be it remembered, that upon the trial of this cause in this Court at a Regular Term of the Court begun and held in the City of Raleigh, N. C., on the 11th day of September, 1934, the Honorable I. M. Meekins, District Judge for the Eastern District of North Carolina, being present and presiding the plaintiff being represented by J. M. Broughton and H. C. Blackwell, and the defendant being represented by J. O. Carr, United States Attorney, and W. B. Snow, Special Assistant to the Attorney General, when and where the following proceedings were had:

The defendant moved to dismiss the action for want of jurisdiction in that, as contended by the defendant, the suit was not instituted within the time in which the United States has consented to be sued, as prescribed by statute.

In the consideration of this motion, the following papers were offered in evidence and considered by the Court:

(1) On December 2nd, 1930, the Veterans Administration, through its proper officer, addressed a letter to Herbert Lester Tyson, enclosing Forms 526-F and 526-C, copies of said letter and said forms are, respectively, Exhibits A-1, A-2, and A-3, and are attached to and made a part of this bill of exceptions.

(2) On July 2nd, 1931, plaintiff signed and executed Form 579 of the Veterans Administration, same being claim for insurance—total and permanent disability, a copy of [fol. 12] which, marked Exhibit "B" is attached to and included as a part of this bill of exceptions.

(3) Copy of the letter of denial, dated November 12, 1932, referred to in the judgment, is attached hereto as Exhibit "C" as a part of this bill of exceptions.

Following the introduction of the above exhibits and the admissions upon which the facts in the judgment are found, judgment was rendered by the Court in favor of the defen-ant, as appears from the judgment which is a part of the record herein.

To the signing and entering of the judgment in this cause, the plaintiff in apt time objected; objection overruled, to which action of the Court the plaintiff then and there excepted, and prays the Court to sign and seal this, the defendant's first and only exception in the bill of exceptions, which is accordingly done this 15th day of November, 1934.

(S.) I. M. Meekins, United States District Judge.
(Seal.) (S.) John H. Manning, Asst. U. S. District Attorney.

Service of the foregoing bill of exceptions is hereby accepted, and copy received.

STIPULATION AS TO BILL OF EXCEPTIONS

It is stipulated and agreed that the foregoing bill of exceptions, including the attached exhibits therein referred

to, is true and correct, and is hereby approved, and shall constitute a part of the record on appeal to the Circuit Court of Appeals.

This the 15th day of November, 1934.

(S.) J. M. Broughton, Attorney for Plaintiff. (S.) John H. Manning, Asst. U. S. District Attorney.

[fol. 18] EXHIBIT A-1

(Copy)

Veterans' Administration

United States Veterans' Bureau

Charlotte, N. C. Regional Office,
December 2, 1930.

51-A-84
C-776 289

Mr. Herbert L. Tyson,
R. F. D. #7,
Fayetteville, N. C.

DEAR SIR:

You are informed that your case has been considered and the Rating Board of this office is of the opinion that you are not entitled to compensation for the reason that you are not shown to have a service connected disability which disables you to a compensable degree.

The above rating is based upon report of physical examination made November 12, 1930, and all other evidence in your file in accordance with the new schedule of disability ratings.

There are enclosed Forms 526-c and 526-F, which you should execute and return without delay if you desire to apply for Disability Allowance.

All future correspondence relative to your claim should bear C-776 289.

By direction, (Signed) R. G. Coldwell, Regional Adjudication Officer, Charlotte, N. C.

Encs. (2).

[fol. 14] EXHIBIT A-2

(Copy)

United States Veterans' Bureau

Adjudication Service

Form 526-F

C-Number 776 289.
Date: Dec. 10, 1930.

I hereby make formal application for any benefits under the War Risk Insurance Act, as amended, and the World War Veterans' Act, 1924, as amended, to which it may be found that I am, or have been, entitled.

I have not* previously made application for the benefits.

(S.) Herbert L. Tyson,
(Full Name)
Pvt. 1 class, 313, Fire & Guard, Q. M. C.
(Bank and Organization at discharge)
Fayetteville, N. C., R. F. D. 7.
(Present Post Office Address)

Received Dec. 12, 1930. Mail Section, R-18.
Received Dec. 12, 1930. Adjudication Division. R-18.

[fol. 15] EXHIBIT A-3

(Copy)

United States Veterans' Bureau

Form 526-c

Application of Veteran

For Disability Allowance Under Section 200, World War Veterans' Act, 1934, as Amended July 3, 1930

Received Dec. 12, 1930. Mail Section, R-18.
Received Dec. 12, 1930. Adjudication Division, R-18.

Name: (Print Clearly)		Tyson	Herbert	Lester	
		(Last name)	(First name)	(Middle name in full)	
Address:	7	R. F. D.	Fayetteville	N. C.	
	(Number)	(Street)	(City or town)	(State)	

*If you have made previous application, either by letter or form, cross out the word "not".

I hereby apply for disability allowance under the provisions of Section 200 of the World War Veterans' Act, 1924, as amended July 3, 1930, and submit the following facts as evidence that I am eligible for that allowance.

1. (a) Place of birth *Fayetteville, N. C.* (b) Date of birth *June 20, 1890*

2. Description of applicant as of date of this application: Sex: *Male;* Race: *White;* Weight: *150* pounds; Height: *70½* inches; Color of hair: *Brown*; Color of eyes: *Blue;* Complexion: *Fair.*

3. Make a cross (X) after branches of service you served in: Army, X; Navy, ——; Marine Corps, ——; Coast Guard, ——.

4. Give dates of enlistment and discharge for each period or periods of service during the World War, commencing prior to November 11, 1918.

[fol. 16]

Enlisted Date	Place	Serial No.	Discharged Date	Place	Rank and organization	Character of discharge
Aug. 4, 1918	Syracuse N. Y.	4306524	12-18-18	Camp Stewart, Newport News, Va.	Pvt. 1st cl., 313th Fire & Guard	Honorable (S. C. D.)

5. (a) Have you ever applied for disability compensation? *Yes.* (b) When and where? *Reg. Office, Charlotte, N. C.* (c) What is your Compensation Claim number? *C-776 289.* (d) Have you ever been physically examined for the United States Veterans' Bureau? *Yes.* (e) If so, give date and place of last examination: *Nov. 12, 1930, Regional office, Charlotte, N. C.*

6. (a) Are you in receipt of retirement pay? *No.* (b) Are you in receipt of reduced retirement pay? *No.* (c) Are you in receipt of retainer pay? *No.* (d) Are you in receipt of a pension? *No.* (e) Are you in receipt of disability compensation? *No.* (f) Are you in receipt of insurance benefits? *No.*

Note—If during any of these enlistments you served under a name other than the one used in this application, state the name under which you served, the period of the enlistment, and full explanation.

7. Nature of disease or injury on account of which disability allowance is claimed: *Arthritis and Heart trouble.*

8. Give full name and complete address of nearest relative: *Mrs. Sudie Tyson, Fayetteville, N. C., R. F. D. 7. (Wife.)*

9. Have you ever been dishonorably discharged from any period of service in any branch of the military or naval service? *No.* If answer is "Yes" state rank and organization at time of dishonorable discharge, and the date of the dishonorable discharge: ——.

10. (a) Are you employed? *Yes.* (b) What is your regular trade or vocation? *Farming.*

11. (a) Did you file a Federal income tax return for the last year? *No.* (b) Where? ——. (c) Were you exempted from payment of an income tax? *Yes.* (d) If so, why? *I did not have a taxable income.*

I hereby certify that answers to all questions are true and complete to the best of my knowledge and belief. (Note: Sections of law printed on reverse side of form.)

(S) Herbert L. Tyson, Signature of claimant.

[fol. 17] Subscribed and sworn to before me this 11th day of Dec. 1930 by Herbert L. Tyson, claimant, to whom the statements herein were fully made known and explained.

Lonnie Carrell, Notary Public. (Seal.) My com. exp. Jan. 28th, 1932.

Be sure to answer a, b, c, and d, under question 11.

[fol. 18] EXHIBIT B.

(Copy)

United States Veterans' Bureau

Adjudication Service

Form 579—Rev. June, 1927

Claim for Insurance—Permanent Total Disability

Herbert Lester Tyson, believe myself to be entitled to
(Name of claimant)
receive the monthly payments of insurance granted by the United States to me under certificate of policy number ——,

on account of permanent total disability resulting from *acute arthritis.*

My permanent home address is *Fayetteville, N. C., R. F. D. #7.*

I desire checks mailed to Herbert Lester Tyson, Fayetteville, N. C., Route 7.

In support of my claim to such insurance I make the following statement as true to the best of my knowledge and belief:

1. Under what name did you serve? *Herbert Lester Tyson.*

2. Color: *White.* Date of birth: *June 20, 1890.* Place of birth: *Cumberland Co., N. C.*

3. Make a cross (X) after branches of service you served in: General Service, ——; Limited Service, X; Army, X; Navy, ——; Marine Corps, ——; Coast Guard, ——; (a) Give Serial No. *4306524.*

4. Date you last entered service: *August 4, 1918.* (a) Place of entry, *Elizabethtown, N. C.* (b) Have you had any previous military service? *No.* (c) If so, give dates of enlistment and discharge, rank and organizations: ——.

5. Date of last discharge: *December 18, 1918.* Place of discharge: *Camp Stewart, Va.*

6. Company and regiment or organization, vessel on which, or station at which, you last served: *313th Fire and Guard Company, Quartermaster Corps.*

7. Rank or rating at time of discharge: *Private.*

8. Nature of discharge: Honorable, X; Ordinary, ——; Dishonorable, ——; Bad conduct, ——; S. C. D., X.

9. Date disability began: *September 10, 1918.*

10. Cause of disability: *Acute Arthritis.*

11. Where received: *Lambert Point, Va.*

[fol. 19] 12. Did you receive treatment at an Army or Navy Hospital or any other hospital? *Yes.* (a) If so, state name and location of the hospital and dates of treatment: *Ninety-eight days in hospital at Portsmouth, Va.*

13. Name and address of physicians who have attended you since your disability began: *Dr. D. S. Currie, Parkton, N. C.*

14. Are you confined to bed? *No.* Do you require constant nursing or attendant? *No.*

15. Name and address of nurse or attendant: ——.

16. Are you willing to accept medical or surgical treatment if furnished? *Yes.*

17. Give number of any compensation claim filed on account of this disability and place where filed: *C-776 289. Charlotte, N. C.*

18. Give the name of the person named as beneficiary in your application for insurance. *My father.*

19. Have you since changed the beneficiary to some other person? *Yes.* (a) If so, to whom? *My wife, Sudie Tyson.*

20. Date and place of last marriage: *Fayetteville, N. C., December 25, 1925.*

21. Give name and address of each of your parents living: *Both parents dead.*

22. Has either you or your wife been previously married? *No.* (a) If so, state when and how former marriages of either were terminated ——.

I do solemnly swear that the foregoing statements are true to the best of my knowledge and belief.

(S.) Herbert Lester Tyson.
(Claimant's name in full)

Subscribed and sworn to before me this 2 day of July, 1931. (S.) J. Lacy Armstrong, Notary Public. (Impression of seal.) My commission expires December 7, 1931.

We, the undersigned, severally solemnly swear that we are well acquainted with the claimant whose name is subscribed above, and that we have read the statements made

herein and the facts as stated are true to the best of our knowledge and belief.

[fol. 20] (S.) P. V. Holland (Signature of witness) St. Paul, N. C. (Address of witness)

(S.) J. G. Riddle (Signature of witness) St. Paul, N. C. (Address of witness)

Subscribed and sworn to before me this 2 day of July, 1931. (S.) J. Lacy Armstrong, Notary Public. (Notarial seal.) (Impression of seal here.) My commission expires December 7, 1931.

[fol. 21] EXHIBIT C

(Copy)

November 12, 1932.
FDBC
c-776, 289

Mr. Herbert L. Tyson,
R. F. D. #7,
Fayetteville, North Carolina.

DEAR SIR:

This is with further reference to the above entitled claim. You are informed that a decision was rendered on Nov. 7, 1932, by the Insurance Claims Council to the effect that the evidence is not sufficient to establish as a fact that the former insured was totally and permanently disabled at a time when the contract of insurance was in force, and therefore the claim has been denied.

You may consider such denial final for the purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended.

If you accept the denial of the claim by the Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C., to your last address of record.

The case folder is being forwarded to the Veterans' Administration at Charlotte, North Carolina. Any further

inquiries concerning your claim should be directed to that office.

By direction, H. L. McCoy, Director of Insurance.

Insurance Form 909.

[fol. 22] In United States District Court

[Title omitted]

Order Allowing Bill of Exceptions—Filed Nov. 28, 1934

Upon the signing of judgment in this cause, the plaintiff in open Court objected and excepted, and gave notice of appeal to the United States Circuit Court of Appeals. Under date of October 20th, 1930, a consent order was filed allowing the defendant until November 20th, 1934, to serve, have settled and allowed his bill of exceptions, and otherwise perfect his appeal to the Circuit Court of Appeals.

The plaintiff has this day filed petition for appeal and an order was this day signed allowing the appeal, and at the same time citation was issued and assignments of error were filed in apt time.

The plaintiff by his attorneys this day presents his bill of exceptions which were taken to the sundry actions and rulings of the Court during the trial of this cause, and requests that it be approved; and the same is hereby allowed and in every respect approved, and is signed, sealed, enrolled and settled, and it is hereby ordered to be made a part of the record on this case on appeal.

This 15th day of November, 1934.

I. M. Meekins, U. S. District Judge.

[fol. 23] In United States District Court

[Title omitted]

Assignment of Error—Filed Nov. 28, 1934

Now comes Herbert Lester Tyson, plaintiff in the above entitled cause, through J. M. Broughton and H. C. Blackwell, his attorneys, in connection with his appeal and petition therefor, and makes the following assignment of error

which he avers occurred during the trial of said cause in the Honorable District Court for the Eastern District of North Carolina:

1. The Court erred in signing the judgment rendered herein, in which judgment it is adjudged and decreed that the Court has not acquired jurisdiction of this cause, and that the same be accordingly dismissed.

For which error, plaintiff prays that said judgment of the United States District Court, for the Eastern District of North Carolina, dated the 11th day of September, 1934, in the above entitled action, be reversed and the cause remanded with direction to the District Court for the Eastern District of North Carolina, and for such other and further relief as may be proper in the premises.

This the 8th day of November, 1934.

Herbert Lester Tyson, by (S.) J. M. Broughton.
(S.) H. C. Blackwell, His Attorneys.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed Nov. 28, 1934

In the above entitled action, upon the appeal by plaintiff from judgment rendered therein in favor of the defendant, it is stipulated and agreed that the following shall constitute the record of the case on appeal:

(1) Summons.
(2) Complaint.
(3) Answer.
(4) Judgment.
(5) Petition for appeal.
(6) Order allowing appeal.
(7) Bill of exceptions.
(8) Order allowing bill of exceptions.
(9) Citation to defendant.
(10) Assignment of error.
(11) Stipulation of counsel.

This the 15th day of November, 1934.

(S.) J. M. Broughton, H. C. Blackwell, Attorneys for Plaintiff. John H. Manning, Asst. U. S. District Attorney.

[fol. 25] IN UNITED STATES DISTRICT COURT

MEMORANDUM UNDER SECTION 7 OF RULE 14

Petition for Appeal, filed Nov. 28, 1934.

Order allowing appeal and allowing appeal in forma pauperis, filed Nov. 28, 1934.

Citation, dated Nov. 15, 1934, with service of same accepted Nov. 15, 1934, by John H. Manning, Assistant United States Attorney.

Order extending time to prepare Bill of Exceptions, filed Oct. 20, 1934.

IN UNITED STATES DISTRICT COURT

ORDER TO TRANSMIT RECORD

And, thereupon, it is ordered by the Court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit; and the same is transmitted accordingly.

Teste:

S. A. A, lCerk. (Seal of District Court.)

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 26] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3811

HERBERT LESTER TYSON, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the District Court of the United States for the Eastern District of North Carolina, at Raleigh

DOCKET ENTRIES

December 7, 1934, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal in forma pauperis, and citation are certified up under section 7 of Rule 14.

Same day, the original order extending the time to prepare bill of exceptions is certified up.

Same day, the appearance of J. Melville Broughton and W. H. Yarborough, Jr. is entered for the appellant.

Same day, two typewritten copies of the transcript of record are filed.

December 10, 1934, the appearance of J. O. Carr, U. S. Attorney, is entered for the appellee.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION OF APPELLANT FOR LEAVE TO PROSECUTE APPEAL IN FORMA PAUPERIS—Filed December 10, 1934

To the Honorable John J. Parker, Senior Circuit Court Judge:

Herbert Lester Tyson, Appellant in the above entitled action now on appeal to the United States Circuit Court of Appeals, Fourth Circuit from judgment rendered in the [fol. 27] United States District Court for the Eastern District of North Carolina, Raleigh Division, respectfully petitions this Honorable Court for an order allowing him to prosecute his said appeal in forma pauperis, and in support of his said petition attaches hereto his affidavit to the effect that he is unable because of his poverty to make any bond or deposit for costs as appellant in said case on appeal.

As will appear from the record the plaintiff, the said Herbert Lester Tyson, was for the same reasons herein set forth, allowed by the District Court to bring his suit originally in forma pauperis.

This the 8th day of December, 1934.

Respectfully submitted, J. Melville Broughton, H. C. Blackwell, Attorneys for Herbert Lester Tyson, Appellant.

IN UNITED STATES CIRCUIT COURT OF APPEALS

AFFIDAVIT OF APPELLANT AS TO POVERTY—Filed December 10, 1934

Herbert Lester Tyson, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action now pending on appeal by him to the Circuit Court of Appeals, Fourth Circuit, from a judgment rendered in favor of the defendant; that he is unable because of his poverty to make any deposit or bond for cost as Appellant in said case on appeal, and that accordingly, it is necessary for him to ask leave of the Court to prosecute such appeal in forma pauperis.

Herbert Lester Tyson.

Sworn to and subscribed before me, this the 12th day of September, 1934. Mary Louisa Williams, Notary Public. (Seal of Notary.) My commission expires May 21, 1936.

[fol. 28] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER ALLOWING APPELLANT TO PROSECUTE APPEAL IN FORMA PAUPERIS—Filed December 11, 1934

Upon the petition and affidavit of the Appellant, by J. M. Broughton and H. C. Blackwell, his attorneys, that he be permitted to prosecute his appeal in this Court in forma pauperis,

It is ordered that the Appellant be, and he is hereby allowed to prosecute his appeal in this Court in forma pauperis, and the cause be heard on the original typewritten transcript of the record.

It is further ordered that the Appellant be, and he is hereby, permitted to file six typewritten copies of his brief instead of twenty printed copies as required by the rules of this Court.

December 11th, 1934.

John J. Parker, Senior Circuit Judge.

December 11, 1934, the appearance of H. C. Blackwell is entered for the appellant.

December 19, 1934, stipulation as to the time for the filing of the respective briefs is filed.

January 29, 1935, the appearance of Wm. B. Snow, Special Assistant to the Attorney General, is entered for the appellee.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MINUTE ENTRY OF ARGUMENT OF CAUSE

January 31, 1935 (January Term, 1935), cause came on to be heard before Parker, Circuit Judge, and McClintic and Hayes, District Judges, and is argued by counsel and submitted.

[fol. 29] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3811

HERBERT LESTER TYSON, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Eastern District of North Carolina, at Raleigh

Argued January 31, 1935. Decided April 2, 1935

Before Parker, Circuit Judge, and McClintic and Hayes, District Judges

W. H. Yarborough, Jr. (H. C. Blackwell and J. M. Broughton on brief) for Appellant, and William B. Snow, Special Assistant to the Attorney General (James O. Carr, U. S. Attorney; Will G. Beardslee, Director, Bureau of War Risk Litigation; Wilbur C. Pickett and Fendall Marbury, Special Assistants to the Attorney General, on brief) for Appellee.

OPINION—Filed April 2, 1935

[fol. 30] PARKER, Circuit Judge:

This is an appeal in a war risk insurance case in which the suit of plaintiff was dismissed for lack of jurisdiction on the ground that it was not instituted within the time required by statute. The suit was instituted November 17, 1932 and asked recovery on a policy of war risk insurance which was kept in force by the payment of premiums until December 1918, the allegation of the petition being that at that time insured was totally and permanently disabled. Insured relied upon the fact that he had filed claim for insurance with the Veterans' Administration to extend the period within which suit might be instituted beyond July 3, 1931, the date upon which it would otherwise have been barred by statute. 38 USCA 445. There is no dispute as to the filing and rejection of the claim, the facts with respect to which are as follows:

On December 2, 1930 the Veterans' Administration wrote a letter to insured advising him that the local rating board was of opinion that he was not entitled to compensation, for the reason that he was not shown to have a service connected disability which disabled him to a compensable degree. With this letter were enclosed forms 526-c and 526-f, which insured was directed to execute and return at once if he desired to apply for a disability allowance. Insured filled in and executed these forms and forwarded them to the Veterans' Administration, by which they were received and filed on December 12, 1930. Form 526-c was an application for disability allowance under Section 200 of the World War Veterans' Act of 1924 as amended July 3, 1930. It contained no statement that insured was or had been totally or permanently disabled or that he made any claim under his policy of war risk insurance. Form 526-f was as follows: "I hereby make formal application for any benefits under the War Risk Insurance Act, as amended, [fol. 31] and the World War Veterans' Act, 1924, as amended, to which it may be found that I am, or have been, entitled. I have not previously made application for the benefits."

On July 2, 1931 insured executed and mailed to the Veterans' Administration a claim for insurance benefits under his policy, claiming that he had been totally and per-

manently disabled since September 10, 1918. This claim was received by the Veterans' Administration on July 3, 1931 and was denied by the director on November 12, 1932. The letter of denial, which was dated November 12, 1932, contained the following statement: "You may consider such denial final for the purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended. If you accept the denial of the claim by the Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C. to your last address of record." The date of the Washington postmark on this letter was November 14th and it was received by insured on November 16th, two days being the period usually required for transmission of mail from Washington to the address of the insured. As stated, the suit was commenced by the filing of the petition on November 17th, although service was not made upon the United States Attorney until November 19th.

It is clear, we think, that the claim filed on December 12, 1930 on forms 526-c and 526-f was not a claim for insurance under the war risk insurance policy. The statute with relation to suits on claims under war risk insurance policies (38 UCSA 445) provides, "The term 'claim' as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits". There is nothing in [fol. 32] the claim which alleges permanent and total disability at a time when the contract of insurance was in force, or which shows any intention to claim insurance benefits. See U. S. v. Collins (C. C. A. 4th) 61 Fed. (2d) 1002; Wilson v. U. S. (C. C. A. 10th) 70 Fed. (2d) 176; U. S. v. Peters (C. C. A. 8th) 62 Fed. (2d) 977; U. S. v. Densmore (C. C. A. 9th) 58 Fed. (2d) 748.

Plaintiff must depend, therefore, upon the claim filed with the Veterans Administration on July 3, 1931 to avert the bar of the statute of limitations; and, while the filing of that claim unquestionably tolled the running of the statute until the claim was denied, we do not think that the action was instituted within proper time even when this is

considered. The exact provision with respect to the suspension of the running of the statute is as follows: "This limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director." 38 USCA 445. The running of the statute is suspended when the claim is filed in the Bureau of War Risk Insurance of the Veterans Administration, not when it is deposited in the mails. Weaver v. U. S. (C. C. A. 4th) 72 Fed. (2d) 20. And it is denied by the director when he takes action denying it, not when notice of denial is received by the insured. Corn v. United States (C. C. A. 10th) 74 Fed. (2d) 438; U. S. v. Thomson (C. C. A. 10th) 71 Fed. (2d) 860; U. S. v. Gower (C. C. A. 10th) 71 Fed. (2d) 366; Stallman v. U. S. (C. C. A. 8th) 67 Fed. (2d) 675; Roberts v. U. S. (C. C. A. 10th) 66 Fed. (2d) 273; Hunnewell v. U. S. 2 Fed. Supp. 389; Hipkins v. U. S. 1 Fed. Supp. 505. We have considered the reasoning to the contrary of this last proposition in Creasy v. U. S. 4 Fed. Supp. 175, but we are not convinced by it. The language of the statute is clear and unambiguous. The statute is "suspended for the period elapsing between the filing in the Bureau of the [fol. 33] claim sued upon and the denial of said claim by the director". Only Congress can prescribe the terms upon which the government may be sued; and when it has done so clearly and unequivocally, neither the bureau charged with the administration of the act nor the courts may add to or take from these terms. Congress might have provided for the suspension of the statute until the insured should be notified of the rejection of his claim. It has not done so, but has provided for suspension only during the period between the filing of the claim and its denial by the director.

It follows that the running of the statute was suspended from July 3, 1931 to November 12, 1932, a period of one year, four months and nine days, applying the well settled rule of excluding the first day and including the last. This period is to be added to the period embraced within the statute, which would otherwise have expired on July 3d; for as said by Judge Chesnut in the Hipkins case, supra, "The suspension of a statute of limitations for a certain period is, in effect, 'time taken out,' for that period and adds the same period of time to the limitation provided in the statute." The period of limitations expired, then, on November 12, 1932, and as suit was not instituted until November

17th, it was clearly barred when instituted. The same result follows if the date of receipt of notice by the insured be taken as the last date of the period of suspension; for in that case the time for bringing suit would have expired on November 16th, the day before the suit was instituted. Only by counting the first day as well as the last in computing the period of suspension could the period of limitations be extended to November 17th; and all of the cases in which the question is involved hold that this is not proper. Thus in Corn v. U. S. supra, claim was filed on July 2, 1931, and it was held that only one day remained of the period of limitations. In Walton v. U. S. (C. C. A. 8th) 73 Fed. (2d) 15, claim was filed on June 22nd and it was held that only [fol. 34] eleven days remained. In U. S. v. Gower, supra, claim was filed on June 20th, and it was held that only thirteen days remained. In U. S. v. Thomson, supra, and in Stallman v. U. S., supra, claims were filed on June 27th in each case, and in each case it was held that only six days remained.

For the reasons stated, the suit was properly dismissed as not having been commenced within the time limited by statute and the judgment appealed from will be affirmed. Affirmed.

[fol. 35] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3811

HERBERT LESTER TYSON, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Eastern District of North Carolina

JUDGMENT—Filed and Entered April 3, 1935

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

April 3, 1935.

John J. Parker, Senior Circuit Judge.

RECITAL AS TO ISSUANCE OF MANDATE, ETC.

On another day, to-wit, May 4, 1935, the mandate of this Court in this cause is issued and transmitted to the United States District Court at Raleigh, North Carolina, in due form.

Same day, the original petition for appeal, order allowing appeal, and order extending the time for the preparation of the bill of exceptions are returned to the Clerk of the United States District Court at Raleigh, North Carolina.

[fol. 36] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,746. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 192. Herbert Lester Tyson, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed June 29, 1935. Term No. 192 O. T. 1935.